

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Review of Commission Consideration)	
of Applications under the Cable Landing)	IB Docket No. 00-106
License Act)	

REPLY COMMENTS OF GLOBAL CROSSING LTD.

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I. INTRODUCTION AND SUMMARY

Global Crossing Ltd., by its attorneys, hereby replies to the comments filed in response to the *Notice of Proposed Rule Making* (the "*Notice*") adopted by the Commission in this proceeding on June 8, 2000.

There is broad support among the commenters for the Commission's objective of streamlining its submarine cable landing license process in a manner that reflects pro-competitive policies. While many applications raise no competitive issues and can be routinely granted, the majority of commenters are in favor of the Commission continuing to review more closely license applications that do present competitive concerns. Global Crossing continues to believe that a streamlining structure can be formulated that will not impose undue burdens on applicants. Such a structure would permit the Commission to identify applications that can be granted under a streamlined process and those applications that, because of the potential market conditions or ownership structures they raise, require heightened scrutiny to ensure a competitive international transport marketplace that will benefit consumers.

The streamlining measures under consideration should not be viewed principally as an indirect attempt to open foreign markets to competition. While the licensing of cross-border, undersea cables by its very nature raises issues related to international markets, the Commission has both the obligation and authority under the applicable law to license cables landing in the United States in a way that promotes competition and the public interest. This proceeding is about ensuring a pro-competitive market structure for undersea cables and thereby creating the proper incentives for investment. It is critical to maintain focus on these vital objectives. It is particularly ironic to see AT&T, an inveterate proponent of the proposition that the FCC must guard against the effects of anti-competitive arrangements overseas on the U.S. market, suddenly suggest that the FCC should abandon its consistent position that competition policy should be applied in situations such as these.

Although the majority of commenters supported the Commission's objectives in this proceeding, many objected to the *Notice's* specific proposals as being too complex and burdensome. The record provides helpful guidance on how the Commission can refine its proposals to make them easier to apply and still promote competition.

Based on this record, Global Crossing recommends that the Commission adopt a multi-pronged approach to streamlining. The Commission should streamline any application that meets any one of four tests. First, it should offer streamlining to any cable proposing to serve a route previously determined by the Commission to be competitive. Second, it should streamline cables being proposed for “thin routes” (*i.e.*, those with *de minimis* traffic) as proposed by Global Crossing. Third, instead of the competitive capacity expansion test proposed in the *Notice*, the Commission should adopt

Global Crossing's proposal to streamline applications where the cable landing parties on the U.S. end of the proposed cable have a combined share of no more than 35 percent of active half circuits, including half circuits of full circuits, on the U.S. side of the route. This test is a simple and effective way of streamlining proposed cables that do not present the competitive concerns raised by consortium cables that involve overly inclusive joint ventures. Fourth, the Commission should also consider a streamlining test that focuses on the foreign-end facilities of a proposed cable as urged by several commenters.

Applications that satisfy any one of these four tests could receive streamlined processing, and those that do not would be reviewed on a case-by-case basis by the Commission. Under this approach, the large majority of submarine cable applications would receive streamlined treatment. Indeed, properly structured consortium cable applications could receive streamlined treatment under any one of these tests. Moreover, any potential cable licensee would have certainty about how it could achieve streamlining. This will both facilitate new investments in cable capacity and greatly expedite the processing of applications, while at the same time preserving the Commission's critical role of promoting competition in international telecommunications. This is fully consistent with international treaties and the Commission's precedent, and will in fact substantially advance the Commission's public interest mandate.

Global Crossing believes the four streamlining tests described above accomplish the Commission's objectives in this proceeding, and at the same time are easier to administer and provide greater certainty compared to the streamlining tests proposed in the *Notice*. If the Commission nonetheless adopts the *Notice's* proposals, including the

pro-competitive conditions test, Global Crossing recommends that it do so with the modifications proposed in Global Crossing's initial comments in this proceeding.

II. THE RECORD SUPPORTS THE COMMISSION'S OBJECTIVE OF ADOPTING STREAMLINING PROCEDURES THAT REFLECT PRO-COMPETITIVE POLICIES.

There is strong support in the record for not only streamlining the cable licensing process, but also for the Commission to continue to play an important role in analyzing competitive issues that may be raised by submarine cable applications. Although there was a range of comment on how best to accomplish these objectives, the great majority of commenters supported the adoption of streamlining criteria that would preserve the Commission's practice of reviewing applications that raise competitive issues with greater scrutiny.¹ Only two commenters -- Cable and Wireless and AT&T Corp. and its affiliates Global Networks USA L.L.C. and Concert Global Network Services Ltd. ("AT&T/Concert") -- argue for a licensing process that would give the Commission little or no role in reviewing such issues.²

¹ See, e.g., Comments of WorldCom at 8 (agreeing "with the Commission that it is critical to guard against anti-competitive behavior in considering Cable Landing License applications ..."); Comments of 360networks at 3 ("... supports the Commission's policy objectives of creating an application process that is expeditious but, where appropriate, allows the Commission to scrutinize the effects the grant of a license would have on competition ..."); Comments of FLAG Telecom at 1 ("... wholeheartedly supports the Commission's proposed objectives of expediting cable landing license application processing where appropriate, discouraging anti-competitive behavior, and encouraging pro-competitive licensing procedures in foreign countries"); TyCom Networks at 3 (proposing an approach to "address the Commission's key concern: the use of market power in a destination market in conjunction with control over capacity, interconnection, and backhaul to threaten competition in the provision of international services").

² Although Sprint is critical of the proposals in the *Notice*, it nonetheless states that "certain aspects of submarine cable systems, such as the operation of DCX cross-connections, possess monopoly characteristics," and that the FCC has an important role

The support for the Commission's role in promoting competition in the submarine cable licensing process is consistent with the economic theory that underlies the *Notice* and the Commission's previous submarine cable licensing decisions. As the *Notice*, at ¶ 11, states, entities that control the key facilities of a submarine cable -- the wet link, landing stations, and backhaul -- "may have the ability to affect competition on particular routes." As explained in the Declaration of Andrew Joskow submitted as Appendix A to these reply comments, the possibility for such anti-competitive control can be considerably enhanced through consortium cable structures. These structures typically amount to joint ventures among nearly all the retail providers of telecommunications services on a given route, including the major telecommunications carriers that control the essential inputs of an international network, *i.e.*, the wet link, cable landing stations, backhaul, operating agreements, and interconnection agreements in countries served by the cable. These joint ventures can produce significant anti-competitive results. First, they can limit the timing and terms of available submarine cable capacity. Second, they can eliminate potential competition for the provision of undersea cable capacity. Third, they can provide carriers with bottleneck control over essential inputs (including the terrestrial network necessary to complete the provision of the transport service) with the incentive as well as the ability to discriminate against carriers on competing cables. Finally, they can raise the costs of smaller and newer carriers, and slow entry by such carriers. Ultimately, the effect of this anti-competitive behavior is to impede the decline in prices for international telecommunications services between the United States and the rest of the world.

to play in reviewing such issues on a "carefully tailored and applied" case-by-case basis. Sprint Comments at 17.

It is cooperation among the largest providers of international services in the world on consortium cables that yields the strong potential for anti-competitive results. Consortium cables, therefore, provide a mechanism for consortium leaders to limit competition among themselves, and between themselves and smaller and newer carriers. The ultimate harm is borne by consumers of international telecommunications services who face higher prices and fewer competitive choices for these services.

The Commission found merit in this economic theory in the *Japan-U.S.* cable licensing proceeding. *Japan-U.S. Cable Order*, 14 FCC Rcd 13066, at ¶ 25 (1999). Moreover, these concerns prompted the applicants in that proceeding to amend their construction and maintenance agreement ("C&MA") "to provide for a more pro-competitive balance among the parties to that agreement" and to "address the major carriers' ability to earn supracompetitive profits, which would ultimately result in higher prices for consumers, by controlling backhaul and the timing of the final capacity upgrade of the cable system." *Id.* at ¶ 26. The Commission noted, however, that, even with these amendments, "potential competitive problems" still remained with consortium cable arrangements. Although it granted the amended *Japan-U.S.* application given the need for more capacity on the U.S.-Japan route, the Commission recognized that there remained concerns about whether consortium cable systems might "slow the growth of competition in international telecommunications" and about "whether there are efficiency benefits to consortium cable systems." *Id.* at ¶ 36. The Commission issued the *Notice* to address these concerns and "to examine how our policies regarding licensing submarine cables might best promote competition and benefit consumers." *Id.*

In its comments to the *Notice*, AT&T/Concert for the most part rehashes the same arguments and economic analysis AT&T supported in the *Japan-U.S.* cable proceeding. It asserts that consortium cables pose no competitive concerns given today's marketplace, and essentially argues that *all* submarine cable applications be routinely granted without any consideration of competitive issues. Global Crossing responds to AT&T/Concert's arguments in more detail in the sections that follow, but it is important to keep in mind that the extreme position AT&T/Concert advocates has already been rejected by the Commission in the *Japan-U.S. Order*. There the Commission recognized the competitive problems raised by consortium cables, and only granted the application involved in that case after it was amended with a number of pro-competitive conditions. As described above, the Commission did so with the reservation that not all the potential competitive problems raised by consortium cables had been solved by these amendments, and promised to initiate this proceeding to examine these issues more thoroughly.³

III. THE RECORD PROVIDES GUIDANCE ON THE BEST MEANS FOR DEVELOPING PRO-COMPETITIVE STREAMLINING RULES.

There is unanimous support in the record for streamlining submarine cable licensing in a way that will expedite application processing. Many parties share the

³ AT&T/Concert also repeatedly attacks Global Crossing throughout its comments, at various points describing Global Crossing's competitive theories as "speculative," "unfounded," "specious," "irrelevant," and driven by "a shameless attempt to use the Commission's regulatory process to handicap more efficient rivals." AT&T/Concert Comments at vi, 19, 21, 24. Hell hath no fury like a former monopolist forced to compete, but AT&T should remember that the same theories it so ridicules were characterized by the Commission as raising "serious issues" in the *Japan-U.S.* proceeding and, as noted above, played an important role in prompting the pro-competitive amendments to the application at issue in that proceeding as well as the Commission's decision to issue the *Notice* in this proceeding. *Japan-U.S. Order* at ¶¶ 25, 36. Ironically, the Commission's reasoning is much like the logic that guides it in interconnection policy domestically, a policy that AT&T has strongly supported.

"strong interest" WorldCom expressed "in ensuring that submarine cable licensing provisions -- both in the United States and overseas -- do not impede the rapid roll-out of cable capacity by as many different competitive entities on as many different routes as possible."⁴

At the same time, many commenters voiced concerns about the specific means by which the *Notice* proposes to accomplish this pro-competitive streamlining. In particular, these commenters support a more straightforward, easy-to-apply set of streamlining guidelines rather than the often complex, fact-intensive streamlining tests proposed in the *Notice*. TyCom, for example, states that the "Commission's streamlining proposals are elaborate, and that may not serve the Commission's streamlining objectives in their application. The complexity of these proposals, if adopted, could actually lengthen -- rather than reduce -- application processing times."⁵ WorldCom urges the Commission to "recognize that overly complex regulations for determining when an application is eligible for streamlining can burden both the Commission's staff and license applicants."⁶

Global Crossing agrees with these commenters. In its comments, Global Crossing noted the complexity of the *Notice's* specific proposals and expressed the concern that they might not result in streamlined procedures.⁷ The record offers a number of useful ways to refine the *Notice's* proposals to ensure they achieve the Commission's goals of promoting competition and expediting application processing. In particular, Global

⁴ WorldCom Comments at 2.

⁵ TyCom Comments at 3.

⁶ WorldCom Comments at 3.

⁷ Global Crossing Comments at 12-13.

Crossing recommends that the Commission consider adopting four streamlining tests.

Two of these tests would focus on the nature of the geographic route in question; under these two tests, if the route was either a thin route or a route previously determined by the Commission to be competitive, an application proposing to serve the route would receive streamlined treatment. Even where an application does not qualify under these two tests, it could still receive streamlined treatment under a test proposed by Global Crossing that focuses on the landing parties' share of active half-circuits on the U.S. end of the cable, *or* under a test that, as urged by WorldCom and others, would focus on the competitive conditions on the foreign end of the cable.

A. There Is Strong Support for a Modified Competitive Route Test.

Several commenters -- WorldCom, FLAG Telecom, Level 3, Global Crossing -- support a more straightforward competitive route test under which applications proposing to serve a route that the Commission has previously determined to be competitive would receive streamlined treatment. For example, WorldCom urges the Commission to "create significant certainty and thereby dramatically increase the number of streamlined applications by adopting a list of submarine cable routes that are presumptively competitive. In order for an applicant for a Cable Landing License to obtain streamlined processing, the applicant would certify that the foreign landing point or points on the proposed cable are on the Commission's list of 'presumptively competitive routes.'"⁸

Routes could be added to this list based on previous decisions regarding nonstreamlined submarine cable applications, declaratory rulings, and also, as suggested by FLAG Telecom, actions taken on the Commission's own motion to identify

⁸ WorldCom Comments at 10. *See also* FLAG Telecom Comments at 4-6; Level 3 Comments at 7; Global Crossing Comments at 11-12.

periodically routes that are presumptively competitive. The Commission could delegate this task to the International Bureau, which could periodically issue a public notice or hold an industry forum to gather the views of interested parties. This process could result in the Commission declaring, for example, that applications for the U.S.-U.K. route would be streamlined given the strong consensus that this route is competitive.

Applications to serve such competitive routes could be presumed to serve the public interest and not to raise any competitive issues, and could therefore receive streamlined treatment under this clear, easy-to-apply test.

Some commenters argue for a regional approach in assessing whether a route is competitive.⁹ As described below, page 25-26, and in the attached Declaration of Andrew Joskow at 14, the relevant geographic market may very well be regional rather than point-to-point in circumstances where there are effective hubbing mechanisms linking the countries in the region. In such cases, the Commission should assess the competitiveness of the route on a regional basis, and, if there is sufficient competition, permit future applications to serve that region to qualify for streamlining. But the Commission should take a regional approach only upon a finding that effective hubbing mechanisms are present. In the absence of such an affirmative finding, the Commission should analyze the competitiveness of a route on a point-to-point basis.

⁹ AT&T/Concert Comments at 40 ("[T]here should be no serious consideration of point-to-point competitive analysis."). *See also* FLAG Telecom Comments at 6 (urging the Commission to declare certain regions competitive); TyCom Comments at 12 (stating that a "route-based approach would not account for the competitive impact of regional connectivity"). In support of its argument, AT&T asserts that carriers are refiling a significant amount of their international traffic. AT&T/Concert Comments, McInerney Affidavit at 12. The prevalence of refiling arrangements, however, is most likely the result of the disparities that exist among international settlement rates, and does not in itself provide reliable evidence that effective hubbing arrangements exist in a region.

A number of commenters argue that the Commission should consider satellite capacity in determining whether a route is competitive.¹⁰ This proposal will not advance the Commission's goals for two reasons. First, Global Crossing believes the *Notice* is correct in proposing not to include satellite service in its streamlining tests because it is not a close substitute for submarine cable transport.¹¹ The Commission has recognized that "the delay and echo inherent in satellite transmission, as well as the cost per circuit, appear to make submarine cable capacity the more attractive medium for international transport of voice and data."¹² Second, this issue is largely academic. On most routes, satellite services typically contribute an inconsequential proportion of total international transport capacity. And on thin routes, where satellite services may make up a substantial portion of the capacity serving the route, Global Crossing has proposed that all applications serving the route be streamlined. In either case, including satellite capacity would not affect whether the application qualifies for streamlining.

B. Global Crossing's Proposal Provides a Clear, Effective Alternative to the *Notice's* Proposed Competitive Capacity Expansion Test.

A number of commenters observed that the *Notice's* proposed competitive capacity expansion test raises complex issues, such as how to define the "key applicant group."¹³ This level of complexity could undermine the Commission's goal of streamlining applications to land cables controlled by new entrants.

¹⁰ FLAG Telecom Comments at 6-7; AT&T/Concert Comments at 45.

¹¹ *Notice* at 13, n. 57.

¹² *MCI/WorldCom Order*, 13 FCC Rcd 18025, 18075, ¶ 83 (1998).

¹³ *See, e.g.*, WorldCom Comments at 7.

In its comments, Global Crossing offered an alternative test to achieve this goal. Under its proposal, an application would receive streamlined treatment if the cable landing parties on the U.S. end of the proposed cable have a combined share of no more than 35 percent of active half circuits, including half circuits of full circuits, on the U.S. side of the route.¹⁴ By focusing on the identity of the landing parties, this proposed test avoids the complex issue of identifying the "key applicant group." It clearly defines a whole category of applications that will raise no competitive issues, and therefore should receive streamlined treatment, given that they would not involve parties that control both key facilities -- *i.e.*, landing stations -- *and* a significant share of retail traffic on the route in question. Parties that have such control have both the ability and the incentive to raise input prices (or otherwise degrade access) to other carriers in order to reduce competition in the retail market, and should consequently be subject to non-streamlined review unless their applications qualified under another streamlining test.¹⁵

A number of parties opposed Global Crossing's proposal.¹⁶ Much of this opposition, however, appears to be based on a misunderstanding of Global Crossing's proposed test. As proposed in Global Crossing's comments in this proceeding, the test only sets forth streamlining criteria for identifying a set of applications that could be routinely granted; it would *not* be used to determine whether an application should be granted or denied. It also would *not* be the exclusive streamlining category; applicants

¹⁴ In attributing half-circuit capacity to various carriers, IRUs would be attributed to the IRU-holder, not to the owner of the cable. Global Crossing Comments at 11.

¹⁵ In addition to the "35 percent" test, Global Crossing has proposed that applications serving thin routes receive streamlined treatment.

¹⁶ The *Notice*, at ¶ 37, summarized Global Crossing's proposal, which it had set forth previously.

that satisfy other appropriate tests -- and a large number would qualify under the streamlining proposals Global Crossing supports -- would also receive streamlined treatment. All of these categories combined should cover the majority of applications.

Most significantly, Global Crossing's proposed test would not, contrary to AT&T/Concert's suggestion, preclude "any carrier (or group of carriers) ... from taking an ownership position in any new cable if that carrier (or group of carriers) controlled more than 35% of the existing capacity on a route."¹⁷ AT&T/Concert is also wrong in asserting that, under the proposed test, consortium cables "that are built will likely be smaller than they otherwise would, because many carriers that own existing capacity would be excluded to avoid the ownership cap," and that the proposed test "would forbid carriers with more than 35% of existing capacity from taken even a *de minimis* ownership interest in a new cable"¹⁸ AT&T/Concert ignores the "plain terms" of the proposed 35 percent test, which would only apply to the active half circuits controlled by the *cable landing parties* on the U.S. end of the proposed cable, not all owners of the cable. This reflects the fact that the landing parties tend to control the key facilities and inputs of a submarine cable. Global Crossing's proposal would not deny streamlined treatment if even large carriers joined cable consortia, or if they purchased capacity on a cable, even a great deal of capacity, so long as the largest carriers were not also landing parties on those cables.¹⁹ AT&T/Concert also ignores the fact that even landing parties that do not qualify under the 35 percent test could still receive streamlined treatment under another

¹⁷ AT&T/Concert Comments at 31.

¹⁸ *Id.*

¹⁹ See Appendix A, Declaration of Andrew Joskow at 15-16.

test, and even those parties that do not could receive license approvals under a non-streamlined process.

FLAG Telecom and Level 3 express concerns that Global Crossing's proposed test could discourage the deployment of next-generation, high-capacity cables.²⁰ These concerns, however, appear to be based on a mistaken belief that the capacity of the proposed cable, which could be large given the deployment of new technologies, would be counted under the 35 percent test. This is not the case. The proposed test is backward-looking, and would only count the active circuits of the currently operating cables.²¹ Moreover, the test should promote, not hinder, the deployment of new infrastructure because it enables the Commission to identify those applications that require heightened scrutiny to ensure that the applicants' control over key inputs and active capacity on a route do not give them the ability and incentive to act anti-competitively against the deployment of competing cables.

Some parties also question whether the showing required under Global Crossing's proposed test would be too burdensome.²² But applicants will readily know whether they will be landing parties on the U.S. side of a proposed route, and will also know the number of active half-circuits they control on the route. With respect to the total number of active half-circuits on the U.S. side of the route, which is necessary to calculate the applicants' proportionate share of such circuits, the Commission's Section 43.61 circuit

²⁰ FLAG Telecom Comments at 10; Level 3 Comments at 8.

²¹ See Appendix A, Declaration of Andrew Joskow at 16.

²² Level 3 Comments at 8; Viatel Comments at 8, n.17.

reports is a useful starting point.²³ As explained in Global Crossing's comments, at 25-26, this information can then be supplemented by data gathered and released by the Commission on a periodic basis. This would enable the parties and the Commission staff to make reasonable estimates of their shares of active capacity on a route without imposing undue burdens.

Global Crossing wishes to emphasize that in calculating a party's share of active half-circuits, IRUs would be attributed to IRU-holders, not to the owner of the cable. Global Crossing's comments, at 24, describe why this provides a far more accurate measure of market share. There was no opposition to this in the comments. In fact, Sprint expressly states that "[p]resumably the applicants should exclude IRUs that they have sold and include IRUs they have purchased on the route in question."²⁴

AT&T/Concert asserts that all capacity, not just active circuits, be counted in this competitive analysis. This, however, misses the key question: whether formation of cables with key facilities controlled by carriers that also have a high share of *retail traffic* has anti-competitive consequences. Control over inactive circuits has no relevance to this determination.²⁵

C. The Commission Should Consider Proposals To Streamline Applications Where The Foreign-End Facilities Are Not Controlled By A Dominant Carrier.

WorldCom recommends that "the Commission should find any Cable Landing License application eligible for streamlined processing where the applicant or applicants certify that neither the cable landing station or stations nor backhaul at the foreign end are

²³ 47 C.F.R. § 43.61.

²⁴ Sprint Comments at 12.

²⁵ Global Crossing Comments at 24-25.

50 percent or more controlled by a carrier with market power in the relevant foreign market. In determining whether a foreign entity has market power, the applicant could refer to the Commission's existing list of foreign carriers with market power that is available on the Commission's Website."²⁶ TyCom and Viatel make similar proposals.²⁷

Global Crossing supports Commission consideration of a streamlining test that would examine whether a dominant carrier controls key facilities, including landing stations and backhaul, on the foreign end of a proposed cable. Global Crossing urges that if the Commission adopts such an approach, the test should assess whether a dominant carrier controls *any* of the landing stations of the proposed cable. In addition, the test should be viewed as an additional streamlining measure rather than a replacement for a competitive capacity expansion test. As described above, Global Crossing has proposed such a test to focus on the U.S.-end of a proposed cable. The logic underlying the Global Crossing test suggests that if an applicant can show that either end of a proposed cable is not subject to anti-competitive ownership structures or market conditions, the application should receive streamlined treatment. Under this reasoning, it would thus appear that both streamlining tests could provide reliable grounds for presuming that the application would not pose anti-competitive concerns, and would permit the Commission to streamline a larger number of applications.

²⁶ WorldCom Comments at 11.

²⁷ TyCom Comments at 3 ("The Commission should adopt a simplified streamlining approach that would inquire whether or not a controlling owner of a submarine cable had market power (directly or indirectly through an affiliate) in a destination market where that cable lands."); Viatel Comments at 5 ("[T]he Commission should grant streamlined treatment to all applications where: (1) no owner of the proposed cable is dominant in a landing station region served by the cable; and (2) no owner of the proposed cable is dominant on a route that is covered by the cable.").

D. Any Pro-Competitive Conditions Adopted By The Commission Should Be Limited To Applications That Do Not Qualify Under Other Streamlining Tests.

WorldCom, Viatel, and FLAG Telecom each supported a pro-competitive conditions streamlining test similar to the one proposed in the *Notice*.²⁸ Global Crossing continues to believe the Commission should put a priority on adopting structural policies to promote competition. These are far more effective and efficient compared to behavioral conditions imposed on licensees. In the event the Commission does adopt a pro-competitive conditions test, Global Crossing recommends that the conditions apply only to those applications that do not otherwise qualify under other streamlining tests, and that the conditions be detailed and enforceable, as set forth in Global Crossing's comments, at 26-29.

E. The Commission Should Reject Streamlining Proposals That Do Not Reflect Its Pro-Competitive Policies.

AT&T/Concert and Cable and Wireless argue that virtually *all* applications be streamlined and granted automatically with little or no review by the Commission.²⁹ The Commission should reject these extreme proposals. They completely fail to take into account the Commission's goals of not only expediting application processing, but also

²⁸ WorldCom Comments at 12-13; FLAG Telecom at 10, n.18. Viatel urges the Commission to adopt the pro-competitive conditions test proposed in the *Notice* supplemented with the additional amendments made to the C&MA at issue in the *Japan-U.S.* proceeding. Viatel Comments at 8-11.

²⁹ AT&T/Concert Comments at vi ("... the Commission should give expedited approval (*i.e.*, 14 days after public notice) to any cable landing license application (other than the limited category of applicants with market power in non-WTO destination markets that continue to require analysis under the ECO test)."); Cable and Wireless Comments at 17 ("...C&W suggests that all applications for cable landing licenses should initially qualify for streamlined processing within the maximum 60 day time frame.").

ensuring "careful review of certain applications to guard against anti-competitive behavior, and encourag[ing] ... pro-competitive license procedures in other countries." ³⁰

The governing statute for cable landing licenses plainly states that "no person shall land or operate" a cable "unless a written license to land or operate such cable has been issued," and further provides that a license may be granted "upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so licensed."³¹ Under the authority delegated by the President, the Commission is obligated to carry out this statutory licensing process. And contrary to AT&T/Concert's suggestion that this process be turned into a rubberstamp, it is incumbent upon the Commission to take into account competitive issues in licensing submarine cables as it seeks to streamline its processes. The Commission has long recognized in other contexts that imposing structural conditions on entry may be the most effective means of ensuring just and reasonable rates for telecommunications services.³²

³⁰ Notice at ¶ 3.

³¹ 47 U.S.C. §§ 34, 35.

³² *Regulatory & Policy Problems Presented by the Interdependence of Computer & Communications Facilities & Services*, 28 FCC2d 291 (1970), *aff'd in part sub nom. GTE Service Corp. v. FCC*, 424 F.2d 724 (2d Cir. 1973), *decision on remand*, 40 FCC2d 293 (1973); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 FCC2d 384 (1980), *recon.*, 84 FCC2d 50 & 88 FCC2d 512 (1981), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982); *Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the CMRS Spectrum Cap*, 11 FCC Rcd 7824, 7869 (1996) (imposing structural ownership cap on CMRS licensees). Moreover, an analogy can be found in the federal antitrust enforcement agencies' Statements of Antitrust Enforcement Policy in Health Care. Statement 2 of this document indicates an antitrust enforcement concern when hospitals form joint ventures to "share the ownership cost of, operate and market" expensive health care equipment and related services. U.S. Department of Justice and Federal Trade Commission, *Statements of Antitrust Enforcement Policy in Health Care*, Statement 2, at 12 (1996). This is similar to consortium cables, where competing carriers share in the ownership costs of constructing an undersea cable, share in the

360networks recommends that the Commission streamline all submarine cable applications except in cases where a petition to deny is filed against the application that, in the view of the FCC staff, "raises legitimate competitive concerns."³³ Global Crossing is concerned that this test provides little or no guidance to parties or the FCC staff regarding which competitive concerns are "legitimate." This proposal could also give parties the incentive to file frivolous "strike" petitions against their competitors' applications in the hope of delaying their processing. As described above, there are a number of streamlining tests the Commission could adopt that would avoid this danger and provide clear criteria that would streamline a large category of submarine cable applications.

IV. THE COMMISSION SHOULD REJECT ARGUMENTS THAT PRO-COMPETITIVE STREAMLINING POLICIES ARE UNNECESSARY.

A. Pro-Competitive Streamlining Policies Will Encourage, Not Deter, New Entry

AT&T/Concert argues that in issuing the *Notice* the Commission is seeking to impose "burdensome entry regulation" that will only serve to delay construction of additional submarine cables. AT&T/Concert goes so far as to predict that the Commission's streamlining proposals would provide "an invitation for strategic misuse by competitors" by giving them the means to block new entry.³⁴

This hyperbole mischaracterizes the Commission's clearly stated objectives and ignores the Commission's statutory obligations and past precedent in this area. It also completely misconstrues how the Justice Department guidelines on competition should

responsibilities of operating it, and share in making capacity on it available for the provision of telecommunications services to end-users.

³³ 360networks Comments at 8.

inform the Commission's actions in this rulemaking. What the Commission has proposed, as is clear in the *Notice*, is that the *current* procedure for considering license applications would be *streamlined* for a large category of applications that clearly present no significant competitive concern. The balance of the applications would be reviewed as before. The Commission's approach thus reduces, rather than increases, regulatory barriers to entry.

The streamlining approach proposed by the Commission is a perfectly reasonable one, one that has in fact been adopted by the Justice Department and the Federal Trade Commission in the Horizontal Merger Guidelines and the recently adopted Guidelines for Competitor Collaborations.³⁵ Under the Horizontal Merger Guidelines, for example, where proposed mergers result in "unconcentrated markets," they are "unlikely to have adverse competitive effects and ordinarily require no further analysis."³⁶ Such mergers usually receive early termination of the Hart-Scott-Rodino waiting periods, under regulations promulgated by the FTC,³⁷ cutting short any further review of them. Mergers

³⁴ AT&T/Concert Comments at 2, 5.

³⁵ U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (revised April, 8, 1997) ("*Horizontal Merger Guidelines*"); Federal Trade Commission and the U.S. Department of Justice, Antitrust Guidelines for Collaborations Among Competitors (issued April 2000) ("*Collaboration Guidelines*"). In light of AT&T/Concert's emotional complaints about the Commission's proposed approach, it is indeed ironic that AT&T/Concert's consulting economists say they *favor* using these Guidelines to analyze cable license applications. Declaration of Ordoover and Willig, at 9-10, 14, 35. As explained at pages 32-33 in these Reply Comments, the limited scope of the Collaboration Guidelines would nevertheless make them inappropriate for use as the sole criteria for evaluating the competitive effects of proposed consortia cable as a substantive matter.

³⁶ *Horizontal Merger Guidelines*, ¶ 1.51(a).

³⁷ *See generally* 16 C.F.R. §§ 801.1-803.90.

that increase concentration to greater levels are subjected to further analysis, but only a small percentage of such mergers are subjected to extensive reviews.

Similarly, under the new Collaboration Guidelines, the agencies have defined two “safety zones,” one for competitor collaborations in general “when the market shares of the collaboration and its participants collectively account for no more than twenty percent of each relevant market” and the other for collaborations for research & development (“R&D”) activities, “where three or more independently controlled research efforts in addition to those of the collaboration possess the required specialized assets ... and the incentive to engage in R&D that is a close substitute.” The agencies will not challenge collaborations falling within one of these categories “absent extraordinary circumstances.”³⁸

The Commission’s proposed streamlining approach is no different. Proposed cables that present no significant issues will be pushed quickly through the process. Those warranting additional analysis will be reviewed in the normal course. Particularly in light of the experience of the federal antitrust agencies in applying their enforcement guidelines, there is no reason whatever to conclude, that all, or even most of the transactions that are subjected to normal review will be ultimately rejected.

AT&T/Concert’s overheated assertions to the contrary should be disregarded.

B. Consortium Cables Raise Competitive Concerns.

1. *Consortium Cable Structures Can Facilitate The Exercise of Market Power.*

AT&T/Concert claims that the *Notice* fails “to identify a coherent theory” as to why it is necessary to take into account competitive issues in formulating application

³⁸ *Collaboration Guidelines*, ¶¶ 4.2 and 4.3.

streamlining tests.³⁹ It also argues that there is no economic theory or evidence that shows that consortium cables could harm competition.⁴⁰

Contrary to AT&T/Concert's arguments, the *Japan-U.S. Proceeding* fully explored these issues and provided strong evidence that consortium cables can in fact raise anti-competitive concerns. Global Crossing submitted extensive materials, including compelling economic theory and evidence, substantiating this. As described above, the record in that proceeding prompted the pro-competitive amendments to the *Japan-U.S.* application and resulted in the Commission expressing serious concerns about certain consortium cable ownership structures.

To further substantiate these concerns, and the need for pro-competitive streamlining policies, Global Crossing submits the Declaration of Dr. Andrew Joskow as Appendix A to these reply comments.⁴¹ Dr. Joskow explains how consortium cable ownership structures facilitate the exercise of market power by the major telecommunication carriers on the consortium cable. As set forth in Dr. Joskow's Declaration at pages 5-10 (Appendix A), consortium cables that combine major international telecommunications carriers that also control key facilities on the undersea cable (*i.e.*, landing stations, backhaul, operating agreements, and interconnection) have

³⁹ AT&T/Concert Comments at 10.

⁴⁰ AT&T/Concert Comments at v-vi, 18-34. AT&T/Concert also takes issue with a theory it claims Global Crossing has advanced regarding "horizontal anticompetitive behavior that focuses on excessive investment in capacity." AT&T/Concert Comments, Ordoover/Willig Declaration at 25. Global Crossing, however, is advancing no such theory in this proceeding.

⁴¹ In addition, Global Crossing submits as Appendices B and C to these reply comments two affidavits it submitted in the *Japan-U.S. Proceeding*. Appendix B is the Affidavit of Andrew Joskow, dated March 15, 1999, and Appendix C is the Affidavit of S. Wallace Dawson, dated March 12, 1999.

the incentive and the ability to exercise market power. It is the combination of the major carriers' control over these key facilities and their large combined share of retail traffic on a route that produces this result. These key inputs include operating agreements, which are critical to carriers providing telecommunication services through correspondent relationships with foreign carriers, and interconnection agreements, which are critical to carriers using full circuits to provide these services. In either case, carriers will cluster on the consortium cable to procure these key inputs. The leverage the major carriers have over these key inputs, and the clustering effect created by the consortium cable, can foreclose entry by competing undersea cables.⁴²

Dr. Joskow correctly emphasizes that the owners of the key facilities on a route are *not* operating as true competitors when they are joint owners of the same submarine cable.⁴³ Through the governance structure established by the consortium's C&MA and related planning and data gathering meetings, these joint venturers can coordinate pricing and other access policies. This coordination yields a credible market signal that it is easier and safer for a smaller carrier to serve a route if it is on the consortium cable. Such proposed joint ventures among the major international carriers thus raise potential anti-competitive concerns and warrant careful review by the Commission.

AT&T/Concert attempts to rebut the clustering effect created by consortium cables by arguing that "the overwhelming majority of new submarine cable circuits are required for Internet, data and other traffic carried on private line circuits that is exempt

⁴² Moreover, most dominant carriers in other countries are still engaged in extensive rate rebalancing--so they have an incentive to keep prices up for international traffic, including international data circuits, and this is one reason why dominant carriers have an incentive to limit competitive provision of capacity.

⁴³ Appendix A, Declaration of Andrew Joskow at ¶ 23.

from the settlement process and has never earned proportionate return. AT&T and Concert estimate that *more than 95%* of new submarine capacity requirements are for private line circuits rather than International Message Toll Service ('IMTS') traffic."⁴⁴ But these arguments are contradicted by the fact that the Commission's data shows that IMTS traffic continues to represent a substantial share of total undersea cable circuits. Moreover, return traffic continues to reduce the incremental cost of terminating traffic according to the Commission's data, and therefore remains important.⁴⁵ These facts demonstrate that operating agreements continue to be an essential input in international telecommunications, and that the Commission should be concerned by submarine cable structures that facilitate anti-competitive conduct regarding this input.⁴⁶ Moreover, it is not necessarily the case that data traffic will be carried on a full-circuit basis, as witnessed by the current debates at the ITU.⁴⁷ In any event, even if the ITU does nothing, the termination of data traffic on a full-circuit basis still requires interconnection rights. When the foreign carrier providing interconnection also controls other inputs associated with a consortium cable and also participates in the market for telecommunication

⁴⁴ AT&T/Concert Comments at 20. AT&T/Concert's argument is primarily based on the unsupported estimates set forth in the Declaration of Thomas McInerney at 5.

⁴⁵ See Appendix A, Declaration of Andrew Joskow at 6-8.

⁴⁶ *Id.*

⁴⁷ The ITU is currently considering the creation of guidelines that would mandate national regulations that could drive the world of international internet traffic to something akin to a settlement rate system. By mandating regulation of pricing and supply arrangements (including the "sharing" of traffic) the ITU could undercut the availability of the "whole circuit" approach that AT&T/Concert claims eliminates the need for pro-competitive intervention by the Commission.

services, the carrier has the incentive and ability to discriminate against carriers that choose competing cables.⁴⁸

2. *The Commission's Competitive Analysis Must Take Into Account Input Markets As Well As The Point-to-Point Nature of Many Routes.*

AT&T/Concert asserts that the relevant geographic market for assessing competition in the international transport marketplace is regional, rather than point-to-point.⁴⁹ Moreover, it argues that all regions are highly competitive given the increase in wet link capacity, and "decreasing concentration of wet link ownership."⁵⁰ Based on these assertions, AT&T/Concert concludes that there is no need for the Commission to adopt streamlining tests that reflect pro-competitive policies.

As an initial matter, not all submarine cable routes should be considered regional. A regional approach is only appropriate where there is an effective hubbing mechanism available, including cost-effective and timely interconnection between international cable systems. The Commission cannot assume that these conditions exist on every significant route. Yet only with these factors can routing traffic between countries in the same region be a competitive substitute for a direct, point-to-point cable link to each country. Therefore, the Commission should begin with a point-to-point (*i.e.*, country-to-country) approach in analyzing competitive issues in the undersea cable marketplace and only treat a market as regional when the evidence has established the practicality of hubbing.

AT&T/Concert is also wrong in emphasizing the amount of wet link capacity on a route, or the concentration of horizontal ownership of such capacity. These factors alone

⁴⁸ See Appendix A, Declaration of Andrew Joskow at 8.

⁴⁹ AT&T/Concert Comments at 16, 40-42.

⁵⁰ *Id.* at 4-9.

do not take into account the control major carriers on a route may have over other inputs - landing stations, backhaul, operating agreements, and interconnection. It is the combination of leverage over these key inputs and the high market shares of retail traffic that give the major carriers on consortium cables the incentive and ability to engage in anti-competitive conduct.

It is similarly mistaken to suggest, as some commenters do, that any proposed cable that would add capacity to a route cannot pose competitive harm and therefore should be granted with virtually no review.⁵¹ These arguments miss the point. The Commission has, of course, recognized the importance of adding additional submarine cable capacity and encouraging new entry. Indeed, its policies have advanced these goals considerably. It is also true that many submarine cable applications pose no competitive risk, and should be granted routinely. But these factors do not preclude the possibility that some proposed submarine cable structures raise anti-competitive concerns. This possibility is, in fact, quite real, as demonstrated by the Commission's decision in the *Japan-U.S.* proceeding. The consortium cable at issue there did not present anti-competitive concerns because it would add additional capacity to a route -- quite to the contrary, the Commission and all parties involved supported this objective -- but because of the harms that could flow from an ownership structure that involved joint planning and cost sharing among many of the largest international carriers.

3. Consortium Cables Are Not Pro-Competitive.

AT&T/Concert attempts to argue that consortium cables are pro-competitive and serve the public interest. It characterizes consortium cables as "cost sharing

⁵¹ Cable and Wireless Comments at 8-9; Sprint Comments at 19.

arrangements" that take advantage of "efficiencies associated with the multi-ownership aspect of those cables."⁵² It further asserts that they provide the owners of consortium cables with a lower cost and ready means of upgrading capacity on a cable.⁵³

These arguments are meritless. Even Sprint, while critical of the *Notice's* proposals, states that "consortium cables, based on a market structure requiring cooperation, were a concomitant of the monopoly era. ... The consortium structure ... is ill suited to the increasingly competitive telecommunications environment that is developing worldwide."⁵⁴ Moreover, AT&T/Concert's praise for the "cost sharing" and economy of scale benefits of consortium cables is belied by its own argument that, thanks to rising demand and technological breakthroughs, "recent events have drastically reduced barriers to entry into transcontinental communications transportation."⁵⁵ Consortium cables are indeed an anachronism in today's environment. In this environment, a joint venture among the largest telecommunications companies in the

⁵² AT&T Comments, Declaration of Thomas K. McInerney at 16-17.

⁵³ *Id.* at 16-18.

⁵⁴ Sprint Comments at 6. Sprint and TyCom suggest that marketplace trends will address issues raised by consortium cables without the need for Commission intervention. Sprint Comments at 7; TyCom Comments at 6-7. Global Crossing, however, believes that consortium cables slow progress toward robust competition and therefore slow the decline in international telecommunications prices that benefits consumers. Progress towards greater competition in the provision of international transport has been, and can still be, furthered by the Commission's efforts. The *Japan-U.S.* proceeding provided evidence of this. *See also* Statement of Kent Nakamura, Sprint, Transcript of Undersea Cable Public Forum at 33-34 (1999) (noting that conditions accompanying FCC decision to regulate AT&T as a non-dominant carrier resulted in lower backhaul prices in the United States).

⁵⁵ AT&T/Concert Comments, Declaration of Thomas K. McInerney at 3. AT&T/Concert also appears to acknowledge that consortium cables are no longer necessary in stating that "[i]f a carrier (or group of carriers) believes that proposed open investment cable

world to build an undersea cable can be no more justified on pro-competitive grounds than a joint venture among the same companies to build the far more expensive networks in the domestic long-distance market.⁵⁶ Such domestic long-distance networks are routinely constructed by single companies (including start-up companies) acting independently.

In a strained effort to portray them as pro-competitive, AT&T/Concert sugarcoats the ramifications of consortium arrangements. For example, AT&T/Concert pronounces that each owner of a consortium cable "has full control over its capacity and can sell and/or use its capacity in whatever manner it wants," and "can convey its interest and has a say in if and when that cable is expanded."⁵⁷ Left unmentioned is the fact that the C&MA for the typical consortium cable gives the major carriers on the cable control over when the cable is upgraded, as well as the fact that these same major carriers often control the landing stations and key input facilities for the cable. Indeed, it was these *anti*-competitive characteristics of the initial plan for JUS that resulted in the applicants amending the *Japan-U.S.* application in order to gain Commission approval.

Apparently figuring that the best defense is a good offense, AT&T/Concert also launches an attack on private cables. We are told that the private cable owner "determines if and when a [sic] capacity will be expanded, which may (or may not) coincide with the business plans of the existing carrier-lessees," and that private cables

terms are unfair, they are free to build a competing cable...." AT&T/Concert Comments at x. *See also* Attachment A, Declaration of Andrew Joskow at 12-14.

⁵⁶ *See also* Appendix A, Declaration of Andrew Joskow at 12-13; Appendix C, Declaration of S. Wallace Dawson at ¶¶ 39-48.

⁵⁷ AT&T/Concert Comments at 28.

"typically limit the ability of carriers to transfer or sell their leasehold interests."⁵⁸

AT&T/Concert even invents a new term for consortium cables, euphemistically labeling them "open investment cables," while it tags private cables with the forbidding sobriquet, "closed investment cables."

Having declared day is night and night is day, AT&T/Concert expects the Commission to abandon its historical efforts to promote facilities-based competition and the consumer benefits that flow from such a policy.⁵⁹ AT&T's own statistics contradict this assertion and demonstrate the need for continued vigilance in this arena. Were it not for the entry of private cables, capacity on the North Atlantic route would have been choked off by the consortium cables allowing them to reap monopoly rents for what little capacity remained.⁶⁰ The Commission's efforts in this proceeding to streamline application procedures and establish safe harbors for undersea facilities deployment will ensure that properly organized private cables and consortium cables will be able to meet future consumer demand for undersea capacity in a timely and effective manner. Perhaps

⁵⁸ *Id.* at 27-28.

⁵⁹ The Commission has made the promotion of facilities-based competition a top priority given that "only facilities-based competition can fully unleash competing providers' abilities and incentives to innovate, both technologically and in service development, packaging, and pricing" *Competitive Networks Notice*, 14 FCC Rcd 12673, at ¶ 4 (1999). For the very same reasons, the Commission has sought to promote the introduction of private satellite systems to compete with INTELSAT. *See In re Applications of INTELSAT LLC, Memorandum Opinion Order and Authorization*, FCC 00-287, at ¶ 6 (released Aug. 8, 2000).

⁶⁰ For example, AT&T cites 12 cables in the trans-Atlantic region totaling 226.88 Gbps, but fails to note that 70 percent of this capacity is from private cables. It also cites plans of five new cables deploying additional capacity -- TAT 14, Level 3/AC-2, FLAG, Hibernia, and TyCom, but again fails to mention that four of the five are private cables and comprise 82 percent of the new capacity. AT&T Comments, McInerney Declaration at 13-14.

the vitriol with which AT&T/Concert states its case is more a reflection of the loss of its ability to charge monopoly rents for trans-Atlantic capacity than disdain for a Commission policy which AT&T has supported in other contexts.

Private cables are the new entrants in the international transport marketplace, and they are achieving the Commission's goal of promoting facilities-based competition. Where the conditions for end-to-end undersea cable competition are present (*e.g.*, no foreign bars to ownership of landing stations, and competitive, nondiscriminatory access to operating agreements, interconnection, and backhaul), as is the case in the North Atlantic, there is robust new entry, primarily by private cables. This substantially enhances competition, which ensures that consumers receive the best prices and quality possible. This is because private cables are planned, deployed, and operated in accordance with overall retail traffic requirements as determined by the market, rather than in accordance with the requirements of the major international carriers, as is the case with consortium cables. The Commission's licensing process should consequently encourage the entry of competing cables.⁶¹ More generally, the licensing process should encourage competition that will yield many different forms of ownership and supply of cable systems. The way to do so is to provide guidelines that address a particular set of competition problems that plague this market in order to make it possible to create "safe harbors" (*i.e.*, conditions for streamlining) for all other potential systems. Even when a

⁶¹ Global Crossing believes the Commission's careful scrutiny in the *Japan-U.S. Proceeding*, and the pro-competitive conditions that arose out of it, contributed to Global Crossing's success in arranging for the termination of its traffic in Japan. Indeed, Global Crossing this year reached an agreement to sell KDD capacity on Global Crossing's PC-1 cable. Although AT&T/Concert cite these developments in arguing that consortium cables present no competitive concerns, Global Crossing believes they demonstrate the opposite -- that the Commission's pro-competitive policies play a vital role in promoting new entry.

system falls outside the streamlining guidelines the Commission should have the option of granting the license, but only after a case-by-case examination of the risks and safeguards to address the risks.

4. *The Appropriate Way To Address Competitive Issues Raised By A Proposed Submarine Cable Is Through The Licensing Process.*

AT&T/Concert argues that, instead of adopting pro-competitive streamlining policies, the Commission should address competitive issues raised by submarine cables through its existing "conduct regulations" -- *i.e.*, the No Special Concessions rule, the International Settlement Policy, benchmark settlement rate conditions -- and through World Trade Organization dispute settlement procedures.⁶² AT&T/Concert maintains that these remedies sufficiently address "problems raised by foreign end monopolists."⁶³

The competitive concerns raised by certain submarine cable applications, however, cannot be simply passed off as "foreign end concerns."⁶⁴ These concerns harm American consumers and are directly raised by proposals to land cables in the United States. The Commission has the responsibility to license these cables, and, as noted above, the authority to do so in a way that "assure[s] just and reasonable rates and service."⁶⁵ None of the remedies offered by AT&T/Concert is a substitute for Commission review of competitive issues during this licensing process. This will

⁶² AT&T/Concert Comments at 34-37.

⁶³ *Id.* at 34.

⁶⁴ *Id.*

⁶⁵ 47 U.S.C. §§ 34, 35.

provide the most effective and efficient way to promote competition and protect consumer interests.⁶⁶

Although not mentioned in AT&T/Concert's comments, AT&T/Concert consultants Janusz Ordover and Robert Willig recommend that the Commission abandon its efforts to adopt streamlining tests, and as a “workable alternative” to that approach, “the Commission should consider adapting the analytical approach developed by the Federal Trade Commission and the U.S. Department of Justice in their *Antitrust Guidelines for Collaborations Among Competitors* (issued April 2000).” Under this concept, “a proposed submarine cable would be disallowed only if opponents of the project demonstrate that the project would likely violate these Guidelines.”⁶⁷

The Commission should reject this recommendation. Because of the limited scope of the Collaboration Guidelines, the approach recommended by Professors Ordover and Willig would result *in no consideration whatever* of the most significant potential competition-related problems associated with consortium cables -- the clustering and market foreclosure problems. As suggested by their title, the Collaboration Guidelines are intended to explain how the Justice Department and the FTC “analyze certain

⁶⁶ Indeed, AT&T vigorously defended the Commission’s right to review the impact of foreign market conditions on competition in the U.S. market in the formulation of rules to implement the WTO agreement. *Foreign Participation Order*, 12 FCC Rcd 23891, ¶ 36 (1997). Although the Commission eliminated the effective competitive opportunities (“ECO”) test and established a presumption in favor of foreign participation in the U.S. telecommunications market (where the applicant is from a WTO member country), it retained its right to examine competitive issues where appropriate.

⁶⁷ AT&T/Concert Comments, Declaration of Ordover and Willig, at 9-10, 35 & n. 40.

antitrust issues raised by collaborations among competitors.”⁶⁸ The scope of the Guidelines is expressly limited, however, to describing the agencies’ approach to analyzing the *horizontal* effects of such collaborations.⁶⁹ To counter any suggestion that such foreclosure problems cannot exist, or that they do not warrant attention, the Guidelines go on to stress that “these effects may be of concern to the Agencies and may prompt enforcement actions” outside of the Guidelines.⁷⁰ Foreclosure-related concerns are precisely the issues the Commission should focus upon in any antitrust review of proposed consortium cables in which the large, vertically integrated carriers participating in the consortium dominate landing stations, backhaul facilities and other essential inputs.

V. ADOPTING PRO-COMPETITIVE STREAMLINING POLICIES IS CONSISTENT WITH GATS AND THE COMMISSION'S PRECEDENT.

Contrary to the arguments of AT&T/Concert, the Commission’s proposal to adopt streamlining rules that reflect pro-competitive policies is consistent both with its past decisions and with the treaty obligations imposed by the General Agreement on Trade in Services (“GATS”). AT&T/Concert is simply wrong, for instance, in arguing that Commission precedents “in related areas” require the Commission to abandon its safe-harbor approach in favor of one granting “presumptive streamlining to all submarine

⁶⁸ Federal Trade Commission and the U.S. Department of Justice, Antitrust Guidelines for Collaborations Among Competitors (issued April 2000) (“*Collaboration Guidelines*”), at 1.

⁶⁹ *Id.*, ¶ 1.1, n. 5 (“These Guidelines [do not] take into account ... the possible effects of competitor collaborations in foreclosing or limiting competition by rivals not participating in a collaboration ...”). The Guidelines also do not take into account the possible effects of standard setting in the context of competitor collaborations.

⁷⁰ *Collaboration Guidelines*, ¶ 1.1, n. 5.

cable landing license applications.”⁷¹ AT&T/Concert fails to note that none of the “related areas” cited in its comments actually illustrates a Commission policy granting presumptive streamlining to *all* applications. Indeed, as discussed below, the Commission’s safe-harbor proposal is well supported by its past decisions and treaty obligations that, far from precluding the proposal, authorize the Commission to protect consumers against precisely the kind of anti-competitive threats that the Commission seeks to address.

A. Pro-Competitive Streamlining Rules Are Consistent With The *International Section 214 Order*.

AT&T/Concert repeatedly suggests that the *International Section 214 Order* supports its proposal that the Commission presumptively streamline all submarine cable landing license applications.⁷² As the *International Section 214 Order* makes clear, however, the Commission pointedly refused in that order to create a presumption that all Section 214 applications are eligible for streamlined treatment. To be sure, the Commission did “[e]xpand the class of applications eligible for streamlined processing,”⁷³ but this expansion – while certainly significant – was not as absolute or “sweeping” as AT&T/Concert suggests.⁷⁴ To the contrary, section 63.12(c) of the Commission’s rules continues – even after the *International Section 214 Order* – to set

⁷¹ AT&T/Concert Comments at 9.

⁷² *See id.* at vi, 8-9, 12, 25.

⁷³ *International Section 214 Order* ¶ 6.

⁷⁴ AT&T/Concert Comments at vi.

forth four categories of applications for which “streamlined processing . . . shall not apply[.]”⁷⁵

By thus refusing to grant presumptive streamlining to all applications, the *International Section 214 Order* continued the Commission’s longstanding policy of remaining vigilant about applications that raise competitive concerns. As AT&T/Concert notes, of course, the Commission also found that “the great majority of international Section 214 applications do not raise public interest issues that warrant Commission scrutiny.”⁷⁶ Yet this point further undermines AT&T/Concert’s main argument. Far from adopting the rubberstamp-version of streamlining advocated by AT&T/Concert, the *International Section 214 Order* illustrates that the Commission will not preemptively apply streamlining procedures to all applications *even where* it acknowledges that a “great majority” of such applications deserves streamlined treatment.

B. The FCC's Findings Regarding The Market Power Of Individual Carriers In Other Proceedings Do Not Preclude Pro-Competitive Streamlining Policies.

AT&T/Concert claims that the Commission has repeatedly found that no U.S. carrier can exercise market power through its ownership of cable landing stations, and that U.S. carriers can obtain operating agreements or establish alternative arrangements with foreign carriers to provide international services.⁷⁷ In support of this claim, AT&T/Concert cites the *AT&T International Non-Dominance Reconsideration Order*⁷⁸ and several decisions in which the Commission reviewed proposed mergers or joint

⁷⁵ 47 C.F.R. § 63.12(c).

⁷⁶ AT&T/Concert Comments at 8; *International Section 214 Order* ¶ 9.

⁷⁷ See AT&T/Concert Comments at v, n. 12; see also *id.* at 12-15.

⁷⁸ *AT&T Int’l Non-Dominance Recon. Order*, 13 FCC Rcd 21501 (1998).

ventures among carriers.⁷⁹ These decisions do not provide a basis for the sweeping conclusion AT&T/Concert hopes to draw from them.

Each of these decisions concerned an individualized assessment by the Commission of a particular carrier or transaction. In none of these decisions did the Commission make a universal finding of fact that would suggest that *all* submarine cable applications can be presumed to be in the public interest no matter what their ownership structure is and no matter what market conditions they raise. To the contrary, these decisions suggest what the Commission has recognized in this proceeding: many applications should present no competitive concerns, but some require closer examination. Indeed, in concluding that AT&T/Concert is non-dominant in its provision of international services, the Commission expressly invited parties to raise concerns over access to cable landing stations "in the context of [its] oversight of construction and maintenance agreements for the introduction of future submarine cable facilities."⁸⁰

Moreover, some applications may present significantly different circumstances than those raised in the decisions cited by AT&T/Concert. For example, none of these decisions concerned a consortium cable arrangement that would have given a few major telecommunications carriers anti-competitive leverage over the key input markets on the route in question. In contrast, the *Japan-U.S.* proceeding did present such concerns, which prompted the Commission to grant the application in that proceeding only after the C&MA had been amended to add a number of pro-competitive conditions. The adoption

⁷⁹ *MCI Communications Corp. and British Telecom PLC*, Memorandum Opinion and Order, 12 FCC Rcd 15351 (1997); *MCI-WorldCom Merger Order*, 13 FCC Rcd 18025 (1998); *AT&T-BT JV Order*, 14 FCC Rcd 19140 (1999).

⁸⁰ *AT&T International Non-Dominance Order* at ¶ 61.

of streamlining policies that continue to enable the Commission to review such competitive issues is therefore fully consistent with its precedent.

C. Pro-Competitive Streamlining Rules Are Consistent With The *Foreign Participation Order* And GATS.

AT&T/Concert argues that the *Notice's* proposals represent an improper attempt by the Commission to open up foreign markets.⁸¹ AT&T/Concert further claims that pro-competitive streamlining tests such as those proposed in the *Notice* would violate the General Agreement on Trade in Services ("GATS"), which requires World Trade Organization ("WTO") members to treat "service and service suppliers of any other Member" in a nondiscriminatory manner.⁸² Based on this duty, the Commission decided in the *Foreign Participation Order* to eliminate the effective competitive opportunities ("ECO") test that "required, as a condition of foreign carrier entry into the U.S. market, that there be no legal or practical restrictions on U.S. carriers' entry into the foreign carrier's market."⁸³ Having vigorously opposed the elimination of the ECO test in the *Foreign Participation* proceeding,⁸⁴ AT&T/Concert now claims that the Commission's streamlining proposals are impermissible because they too closely resemble the ECO test.

⁸¹ AT&T/Concert Comments at iii.

⁸² *Foreign Participation Order* ¶ 40. See AT&T/Concert Comments at iv, 16-18.

⁸³ *Foreign Participation Order* ¶ 5.

⁸⁴ See *Foreign Participation Order* at ¶ 36 (describing AT&T's argument that elimination of the ECO test would "pose a significant threat of anti-competitive conduct" from many member states).

The Commission should reject AT&T/Concert's arguments.⁸⁵ As an initial matter, the Commission's streamlining proposals are not aimed at opening up foreign markets to competition. They simply seek to provide greater certainty regarding the manner in which the Commission licenses submarine cables that land in the United States. To be sure, this licensing process may raise issues related to international markets. But this is unavoidable given the cross-border nature of submarine cables, and in no way diminishes the important role the Commission should play in ensuring proposed submarine cables are not structured in anti-competitive ways that will harm the American consumer. Indeed, under section 1 of the Reference Paper, the United States has an affirmative obligation to ensure that major suppliers do not engage in anticompetitive conduct. The proposed licensing rules, because they are designed to prevent anticompetitive conduct, are fully consistent with U.S. trade obligations.

Moreover, contrary to AT&T/Concert's argument, the Commission is not proposing to discriminate against any applicant based on its nationality. Rather, the Commission is proposing to adopt certain reasonable streamlining procedures that would take into account competitive issues that may be raised by a submarine cable application, which are filed predominantly by U.S. carriers. Because the Commission is thus

⁸⁵ Moreover, AT&T/Concert's argument fundamentally misconstrues the purpose and effect of the proposed rules. AT&T/Concert claims that the proposed rules would "condition cable landing licenses to serve WTO Member countries on the basis of market access conditions in those countries." AT&T/Concert Comments at 63. This is incorrect. The Commission has not proposed to condition licenses on market access conditions - that is, whether a WTO Member has granted U.S. carriers access to its market. Rather, the Commission proposes to review competitive conditions in a market if those conditions threaten to harm competition in the U.S. market. It does not single out carriers or cables on the basis of their national identity. It merely looks at issues involving market power as it influences competition in the U.S. market, something that the Commission does routinely today.

proposing to apply pro-competitive conditions that are nationality-neutral, GATS does not prohibit the Commission's streamlining proposals. To the contrary, these proposals are fully consistent with Article VI of GATS, which expressly contemplates that WTO members may impose objective, transparent conditions on licenses granted to service suppliers of other members. Finally, the *Foreign Participation Order* recognizes the Commission's authority – consistent with GATS – to prevent anti-competitive conduct where harm or the serious threat of harm to U.S. consumers is shown.⁸⁶

⁸⁶ *Foreign Participation Order* at ¶ 51 (citing raising rivals' costs and abuse of market power as examples of anti-competitive conduct that the Commission has authority to prevent). *See also id.* at ¶ 13 ("recogniz[ing] the possibility that circumstances might arise in which our safeguards might not adequately constrain the potential for anti-competitive behavior" and "reserv[ing] the right [in such cases] to attach additional conditions to a grant of authority, and in the exceptional case in which an application poses a very high risk to competition, to deny an application.").

V. CONCLUSION

The record in this proceeding supports the Commission's efforts to adopt pro-competitive streamlining policies for licensing submarine cables. With a number of modifications, the Commission's proposed approach can both promote competition and minimize administrative burdens on applicants.

Respectfully submitted,

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